

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD LaFOREST,

Defendant-Appellant.

UNPUBLISHED

May 25, 2010

No. 291553

Grand Traverse Circuit Court

LC No. 08-010706-FH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of maintaining a drug house, MCL 333.7405(d), and possession of marihuana, MCL 333.7403(2)(d). He was acquitted on a third count of manufacturing, delivery, or possession with intent to deliver less than 5 kilograms of marihuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced to six months in jail for each of his two convictions. He now appeals and we affirm in part and vacate in part.

Defendant, who had been suspected of being involved in drug trafficking based upon information supplied by a confidential informant, was the subject of a traffic stop and arrest based upon an outstanding arrest warrant. This resulted in a search, which yielded some marihuana. Thereafter, the police obtained a search warrant for his apartment, in which additional marihuana in several plastic bags and a digital scale were discovered.

On appeal, defendant first argues that the trial court erred in refusing to suppress the evidence found in his apartment pursuant to the search warrant. We disagree. Although the trial court concluded that the affidavit in support of the warrant failed to establish probable cause, the trial court further concluded that, in light of the recent opinion of the United States Supreme Court in *Herring v United States*, ___ US ___; 129 S Ct 695; 172 L Ed 2d 496 (2009), it was inappropriate to apply the exclusionary rule. We agree with the trial court.

The defendant in *Herring* was arrested based upon an outstanding arrest warrant as reflected in a local police database. A search subsequent to the arrest revealed a controlled substance and an unlawful possession of a firearm. Thereafter, however, it was discovered that the arrest warrant had been canceled five months earlier, thus invalidating the original arrest. 129 S Ct at 698. The Supreme Court nevertheless concluded that application of the exclusionary rule was inappropriate because:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level. [129 S Ct at 702.]

The Court emphasized in its conclusion that mere negligence by the police is insufficient to trigger the application of the exclusionary rule because any marginal deterrence provided by the exclusionary rule is insufficient to justify the cost of applying the exclusionary rule. 129 S Ct at 704.

In the suppression hearing in the case at bar, while the trial court was critical of the affidavit, and perhaps even of the magistrate for issuing the warrant, the trial court also clearly concluded that the failure “does not appear to the Court to be recurring or other than attenuated negligence. It doesn’t appear to be the type of conduct that is sufficiently culpable . . . that exclusion is worth the price paid by the justice system.” The trial court then declined to apply the exclusionary rule based upon the standard announced in *Herring*.

Defendant argues that the police conduct in this case was both reckless and systemic, but provides little in the way of support for that conclusion. Defendant’s argument largely consists of quoting the trial court’s misgivings with the affidavit in this case. But those misgivings are largely centered on what was not included in the affidavit. The trial court never concluded that the police did not, in fact, have probable cause, only that they failed to include sufficient detail in the affidavit to set out the probable cause. Indeed, defendant makes no showing that the police could not have set out probable cause in the affidavit, only that the affidavit did not set out the details. As for a systemic error, defendant fails to point to any other cases where there is similar lack of attention to detail in the affidavits; a single case does not establish a systemic problem. Indeed, defendant only points to the trial court charging the prosecutor to meet with the police to go over the “boiler plate” language in their warrant requests to avoid such problems in the future. But this hardly amounts to a finding by the trial court that a systemic problem exists; rather, it reflects a conscientiousness by the trial court to help ensure that a problem does not become systemic. Indeed, a conclusion that the trial court concluded that the problem was systemic would contradict the trial court’s explicit statement that it did not find the problem to be recurring.

For these reasons, we are not persuaded that the trial court erred in concluding that application of the exclusionary rule is inappropriate in this case.

Defendant next argues that there was insufficient evidence to support his conviction for maintaining a drug house. We agree. Claims of insufficient evidence are reviewed de novo by looking at the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find each element of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992).

Both parties direct our attention to Chief Justice Taylor’s opinion in *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). The Court in *Thompson* focused on whether there is a requirement of continuity for a conviction under MCL 333.7405(1)(d) and defendant concedes

that there was evidence, based upon defendant's own testimony, that he continuously possessed marihuana for personal use in his apartment. But in reaching its decision in *Thompson, supra* at 156, the Court adopted the reasoning of the Alaska Court of Appeals in interpreting its statute and quoted the following passage from *Dawson v State*, 894 P2d 672, 678-679 (Alas App, 1995):

The state need not prove that the property was used for the exclusive purpose of keeping or distributing controlled substances, but such use must be a substantial purpose of the users of the property, and the use must be continuous to some degree; incidental use of the property for keeping or distributing drugs or a single, isolated occurrence of drug-related activity will not suffice. The purpose [for] which a person uses property and whether such use is continuous are issues of fact to be decided on the totality of the evidence of each case; the state is not required to prove more than a single specific incident involving the keeping or distribution of drugs if other evidence of continuity exists.

Defendant argues that the evidence only establishes that the "substantial purpose" of his apartment was to provide a residence for himself and his son and that it was only incidentally used to store his personal supply of marihuana, which he did not even use on the premises but smoked off-premises. The prosecutor's response to defendant's argument is underwhelming, only stating that the jury was properly instructed in light of the *Thompson* decision and making a bare claim that there was sufficient direct and indirect evidence that defendant was maintaining a drug house without even bothering to specifically identify what that evidence was.

We agree with defendant that there was insufficient evidence to establish that a substantial purpose of the apartment was its use as a drug house rather than it being used only incidentally to store drugs. Therefore, we vacate defendant's conviction for maintaining a drug house.

Defendant next argues that the trial court erred in failing to grant a mistrial for the prosecutor's improper injection of the issue of sentencing into the trial. We disagree. During closing arguments, the prosecutor stated that defendant wanted the jury to merely convict him of simple possession of marihuana because it was the lesser of the offenses with which defendant was charged. Defendant objected, and the trial court sustained the objection and instructed the jury that it was not to consider the issue of the possible penalties. We review a denial of a mistrial for an abuse of discretion, *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), and we are not persuaded that the trial court abused its discretion in its handling of this issue. We believe that a curative instruction adequately addressed the issue and a mistrial was not required. Furthermore, at this point we would have to conclude that any error was harmless. The jury acquitted defendant on the delivery charge and we have set aside the maintaining a drug house conviction. This leaves only the lesser offense of simple possession, an offense to which defendant readily admitted his guilt. Accordingly, any error did not affect the outcome of the trial and was harmless. *People v Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006).

Defendant's final argument is that the trial court erred in denying his request for a cautionary instruction on the use of "drug profile" evidence. Defendant, however, raises this argument only with respect to its possible effect on the jury convicting him for maintaining a drug house. Because we have vacated that conviction, this issue is now moot.

Defendant's conviction and sentence for maintaining a drug house is vacated. His conviction for simple possession of marihuana is affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Stephen L. Borrello